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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BITTEN THORENGAARD[1]

Appeal 2016-004247
Application 12/377,469
Technology Center 1700

Before BRADLEY R. GARRIS, DONNA M. PRAISS, and CHRISTOPHER L. OGDEN, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge.*

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134, Appellant appeals from the Examiner's rejections under 35 U.S.C. § 103(a) of claims 1, 2, 4–15, 18–20, 22–34, and 36–39 as unpatentable over Cherukuri (EP 446170 A2, pub. September 11, 1991) in view of Andersen (WO 2004/004479 A1, pub. January 15, 2004) or alternatively over Andersen in view of Cherukuri. We have jurisdiction under 35 U.S.C. § 6.

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[1] Gumlink A/S is identified as the real party in interest. App. Br. 3.

We AFFIRM.

Appellant claims a chewable confectionary composition and a confectionary encapsulation delivery system comprising certain amounts of a natural resin, a high intensity sweetener, and a polyvinyl acetate wherein the encapsulation delivery system is a particulate system (independent claims 1 and 33). In a particular embodiment, the encapsulation delivery system comprises a delayed release encapsulation system releasing a certain amount of high intensity sweetener at a certain rate (dependent claim 39).

A copy of representative claims 1 and 39, taken from the Claims Appendix of the Appeal Brief, appears below.

1. A chewable confectionery composition having modified release, said composition comprising
- a confectionery base,
-at least one confectionery ingredient, and
- at least one encapsulation delivery system comprising at least one high intensity sweetener, at least one polyvinyl acetate and at least one natural resin, wherein said encapsulation delivery system comprises a total amount of the at least one natural resin in the range of 5-60% by weight, an amount of the at least one high intensity sweetener in the range of 10-50% by weight, and an amount of the at least one polyvinyl acetate in the range of 15-85% by weight, and
wherein said encapsulation delivery system is a particulate system.

39. The confectionery composition according to claim 1, wherein said encapsulation delivery system comprises at least one delayed release encapsulation system releasing at least 25% of its high intensity sweetener during the period from 6 minutes to 15 minutes of chewing the confectionary composition.

Appellant argues independent claims 1 and 33 together without presenting separate arguments specifically directed to the dependent claims (App. Br. 8–19) except for dependent claim 39 (*id.* at 18). Accordingly, dependent claims 2, 4–15, 18–20, 22–32, 34, and 36–38 will stand or fall with their parent independent claims, of which claim 1 is representative.

We will sustain the Examiner's rejections for the reasons given in the Final Action, the Answer, and below.

The Examiner finds that each of the applied references teaches or would have suggested the subject matter defined by the independent claims including a particulate encapsulation delivery system comprising a high intensity sweetener, a polyvinyl acetate, and a natural resin except that Cherukuri does not disclose the claimed resin amounts and Andersen does not disclose the claimed sweetener amounts (Final Action 2–4). Nevertheless, the Examiner concludes that it would have been obvious to provide Cherukuri's natural resin in the claimed amounts in view of Andersen and to provide Andersen's high intensity sweetener in the claimed amounts in view of Cherukuri (*id.* at 4).

Appellant argues "common knowledge in this art has been established in the present Application . . . [that] one of ordinary skill would have no reasonable expectation that polyvinyl acetate would be useful together with a natural resin (ester gum) in an encapsulation delivery system" (App. Br. 16; *see also id.* at 18). As support for this argument regarding common knowledge, Appellant relies on the three Andersen Declarations of record (i.e., filed 5 March 2013, 10 October 2013, and 30 June 2014) which discuss

the column 4, lines 8–31, disclosure of the Bakal patent of record (i.e., U.S. Patent No. 4,087,557 issued 2 May 1978) concerning ester gum such as hydrogenated or dimerized ester gum and polyvinyl acetate (*see, e.g.*, Reply Br. 26–28).

Appellant fails to explain with any reasonable specificity why Bakal's disclosure of polyvinyl acetate and ester gum such as hydrogenated or dimerized ester gum militates against the combination of polyvinyl acetate and natural resin such as polyterpene resin as claimed by Appellant (*see, e.g.* claim 4) and disclosed by each of Andersen (*see, e.g.* Andersen 4:15–17, 9:8–15, 29:6–19, and 30:7–20) and Cherukuri (*see, e.g.* Cherukuri 4:33–44, 6:42–50, and claim 14). The record before us including the respective disclosures of Andersen and Cherukuri support a determination that one with ordinary skill in this art would have reasonably expected the combination of polyvinyl acetate and natural resin such as polyterpene to be successful as a useful combination in a particulate encapsulation delivery system. Under these circumstances, the argument under consideration lacks persuasive merit.

Appellant also contends that "Cherukuri and Andersen, alone or in combination, fail to disclose or suggest a particulate encapsulation delivery system, much less the very specific encapsulation delivery system claimed herein, comprising at least one high intensity sweetener, at least one polyvinyl acetate and at least one natural resin" (App. Br. 10).

Appellant's contention fails to reveal error in the Examiner's finding that Cherukuri discloses a delivery system (4:33–35) in powder or

granulated (i.e., particulate) form (5:17–19) comprising polyvinyl acetate (4:42–44), encapsulated sweetener for imparting high intensity sweetness (5:53–54), and natural resin such as polyterpene (6:42–50 and claim 14). Similarly, the contention shows no error in the Examiner's finding that Andersen's system for controllably releasing or delivering flavor and sweetness (3:26–31) comprises granules (i.e., particulates) (2:16–21), encapsulated sweetener (3:1–3) including high intensity sweetener encapsulated with another chewing gum component such as a resinous compound (12:31–13:10), polyvinyl acetate (4:15–17, 9:8–15), and natural resin (6:24–28) to facilitate flavor release (7:28–30).

Finally, Appellant argues that Cherukuri's sweetener and polyvinyl acetate ranges do not teach or suggest the corresponding independent claim ranges (App. Br. 14). According to Appellant, for example, "[t]he about 30% to about 93% range of polyvinyl acetate in Cherukuri fails to suggest, much less teach, the claimed 15-85% by weight of PVA recited in Appellant's encapsulation delivery system [of the independent claims]" (*id.*).

Appellant's argument is not convincing. Cherukuri's above ranges overlap and therefore would have suggested the independent claim ranges as correctly explained by the Examiner (Ans. 12–13 (citing *In re Peterson*, 315 F.3d 1325, 1329–30 (Fed. Cir. 2003))).

In summary, the arguments and evidence of record for and against obviousness, on balance, support the Examiner's conclusion that the subject matter defined by the independent claims would have been obvious based on the combined teachings of Cherukuri and Andersen.

In rejecting dependent claim 39, the Examiner determines that the parameters affecting sweetener release rate are well understood and that it would have been obvious to adjust the release rate for the high intensity sweetener of Cherukuri or Andersen whereby at least 25% of the sweetener is released during the period from 6 minutes to 15 minutes of chewing the confectionary composition as claimed (Final Action 7–8).

Appellant contests the Examiner's obviousness conclusion by stating without embellishment "[t]here is simply no teaching or suggestion of this explicit claimed invention in any prior art" (App. Br. 18).

Appellant's unembellished statement reveals no error in the Examiner's rejection of claim 39. On the other hand, obviousness is supported by the fact that control of sweetener release is desired by both Cherukuri (*see, e.g.*, 5:17–24 and 5:45–47) and Andersen (*see, e.g.*, 12:31–13:10).

For the reasons stated above and given by the Examiner, we sustain the § 103 rejections of claims 1, 2, 4–15, 18–20, 22–34, and 36–39 as unpatentable over Cherukuri in view of Andersen or Andersen in view of Cherukuri.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED